RIH SERVICES (M) SDN BHD

v.

TANJUNG TUAN HOTEL SDN BHD (NO 1)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-1254-2001]
2 JANUARY 2002

CIVIL PROCEDURE: *Injunction - Ex parte interim injunction order - Whether court has jurisdiction to extend order beyond life span of 21 days - Cheah Cheng Lan v. Heng Yea Lee - Arab-Malaysian Credit Bhd v. Tan Seang Meng - Rules of the High Court 1980, O. 29 r. 1 (2B), O 92 r. 4*

This was a case where the plaintiff sought to extend an *ex parte* interim injunction order ('the said order') obtained against the defendant on 6 December 2001 until the disposal of the *inter partes* hearing between them. The plaintiff sought the extension to reply to an affidavit filed by the defendant ('encl. 15') on 26 December 2001, which was the last day of the 21 days life span of the said order pursuant to O. 29 r. 1(2B) of the Rules of the High Court 1980 ('RHC').

The issues were: (1) whether the said order would lapse on 27 December 2001 and not 26 December 2001 as the day the said order was granted on 6 December 2001 should be excluded for calculation purposes; and (2) whether the court could extend the said order under the inherent jurisdiction of the court under O. 92 r. 4 of the RHC to override the provisions of O. 29 r. 1(2B).

Held:

[1] By virtue of O. 29 r. 1(2B) of the RHC, the words "from the date on which it is granted" must surely mean that 6 December 2001 must be taken into account into calculating the 21 days. Therefore, the last day for the said order to "automatically lapse" shall be 26 December 2001. (p 465 a-c)

[2] The Court of Appeal in *Cheah Cheng Lan v. Heng Yea Lee* laid down two principles of law: (a) that where the life span of an *ex parte* injunction has been determined by the rules, the court must give effect to it; and (b) that the inherent powers of the court cannot be used to extend the *ex parte* injunction order from time to time. That case was *per incuriam* in not considering its earlier decision in *Arab-Malaysian Credit Bhd v. Tan Seang Meng* wherein it was held that O. 92 r. 4 of the RHC could be invoked to override the provisions of the rules. Order 92 r. 4 of the RHC

places justice above all else and empowers the court to make "any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court". Further, sub-rr. (2B) and (2BA) of O. 29 r. 1 of the RHC make no express provisions after the lapse of the *ex parte* interim injunction order at the end of the 21 days and pending the disposal of the *inter partes* hearing. The plaintiff herein merely sought to extend the life span of the said order pending the disposal of the *inter partes* hearing based on all the affidavits that would have been filed in court by then. This court could certainly resort to O. 92 r. 4 of the RHC and extend the life span of the said order. However, it was bound by the doctrine of precedence. Until the Federal Court overrules *Cheah Cheng Lan*, this court has no choice but to abide by the ruling in that case. (pp 466 h-i, 467 a, g-i, 470 g-i, 474 h-i, 476 b-d & 479 g)

[Application dismissed.]

Case(s) referred to:

Aje Best-On Sdn Bhd v. YB Ahmad Omar & Anor [2000] 3 CLJ 515 ***(refd)***

All Persons in Occupation of The House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn Bhd [1998] 5 CLJ 49 ***(refd)***

Arab-Malaysian Credit Bhd v. Tan Seang Meng [1995] 1 CLJ 773 ***(refd)***

Ban Seng Hong Sdn Bhd v. Malaysian French Bank Bhd [1989] BLD Yearbook 353 ***(refd)***

Bank Utama (M) Bhd v. Seri Mayhua Sdn Bhd & Ors [2001] 5 MLJ 169 ***(refd)***

Berad v. Berad [1919] AC 956 ***(refd)***

Boyce v. Gill [1891] 64 LT 824 ***(refd)***

Brand v. Mitson [1876] 24 WR 524 ***(refd)***

Bursey v. Bursey [1960] 58 DLR (2d) 451 ***(refd)***

Camosun Commercial Co v. Gareston & Bolster [1914] 7 WWR 219 ***(refd)***

Castle Fitness Consultancy Pte Ltd v. Manz [1990] 1 MLJ 141 ***(refd)***

Cheah Cheng Lan v. Heng Yea Lee [2001] 1 CLJ 727 ***(foll)***

Connelly v. DPP [1964] AC 1254 ***(refd)***

Duke v. Reliance Systems Ltd [1987] 2 WLR 1225 ***(refd)***

Fulcrum Capital Sdn Bhd v. Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) & Another Case [2001] 5 CLJ 73 ***(refd)***

Glasgow Navigation Co v. Iron Ore Co [1910] AC 293 ***(refd)***

Huddersfield Police Authority v. Watson [1947] 2 All ER 193 ***(refd)***

IHFIM Consultancy Services (M) Sdn Bhd v. Baharin Ayob & Ors (No 1) [1998] 3 CLJ Supp 230 ***(refd)***

Jakob Renner & Ors v. Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur & Ors [2000] 3 CLJ 569 ***(refd)***

Lazard Brothers & Co v. Midland Bank Ltd [1933] AC 296 ***(refd)***

Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 ***(refd)***

Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors [1991] 2 MLJ 564 ***(refd)***

Lim Nyook Yin v. Ultratech Sdn Bhd & Anor [1995] 1 CLJ 215 ***(refd)***

Morelle Ltd v. Wakeling [1955] 1 All ER 708 ***(refd)***
Pacific Centre Sdn Bhd v. United Engineers (M) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 ***(refd)***
Peacock v. Bell & Kendall [1667] 1 Wms Saund 73 ***(refd)***
Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 ***(refd)***
Png Siaw Luan v. Wong Tui San [1990] 3 MLJ 340 ***(refd)***
R v. Jefferies [1968] 3 WLR 830 ***(refd)***
R v. Kensington Income Tax Commissioners [1917] 1 KB 504 ***(refd)***
R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***
Re Barnato [1949] Ch 258 ***(refd)***
Re Nichia Estate and City of Toronto [1968] 66 DLR (2d) 200 ***(refd)***
Sumner v. William Henderson & Sons Ltd [1963] 1 WLR 823 ***(refd)***
Sun Life Assurance of Canada v. Lewis [1944] AC 111 ***(refd)***
Tetlow v. Orela Ltd [1920] 2 Ch 24 ***(refd)***
Umas Sendirian Bhd v. RHB Bank Bhd & Anor [2000] 6 CLJ 564 ***(refd)***
Yomeishu Seizo Co Ltd v. Sinma Medical Products (S) Pte Ltd [1991] 3 CLJ 2357; [1991] 4 CLJ (Rep) 1189 ***(refd)***

Legislation referred to:
Interpretation Acts 1948 & 1967, s. 105(a)
Rules of the High Court 1980, O. 29 r. 1(2), (2BA), O. 92 r. 4

Other source(s) referred to:
Benjamin N Cardozo, *The Nature of the Judicial Process*, New Haven and London: Yale University Press 1921, pp 33, 34
Gerald L Gall, *The Canadian Legal System*, Toronto: Carswell Legal Publications, 1983, 2nd edn, p 220
John Bouvier, *A Law Dictionary*, 1856, 6th edn
Lord Denning, *The Discipline of the Law*, London: Butterworths 1979, p 292
Sir Jack Jacob QC, *The Inherent Jurisdiction of the Court*, 1970, Current Legal Problems 23

For the plaintiff - R Abraham (K Mohan & K Prakash); M/s Shook Lin & Bok
For the defendant - Zainal Abidin Jamal (Youngesswary Singam); M/s Zainal Abidin & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Brief Background

The plaintiff has been described as a company incorporated in Malaysia and is said to be an associate of the Safuan Holdings group of companies. The defendant too has been described to be a company incorporated in Malaysia and is said to be a subsidiary of Damansara Realty Sdn Bhd which is listed on the main board of the Kuala Lumpur Stock Exchange.

By a management agreement dated 15 September 1991, the parties agreed that the plaintiff would manage and operate a hotel known as the Regency Hotel and Resort, Port Dickson which belonged to the defendant. The management agreement described the defendant as the owner while the plaintiff has been described as the manager. The management agreement was to subsist for ten (10) years with an option to the plaintiff to extend for a further ten (10) years and under the said agreement the plaintiff would be paid a management fee of 3% out of the total annual revenue. Under the management agreement the plaintiff was to have an uninterrupted control and operation of the hotel and the defendant agreed not to interfere with the day to day running of the hotel.

It was said that in breach of the terms of the management agreement, the defendant had failed and/or neglected to pay the plaintiff its management fees from October 1995. It was said that the unpaid management fees as at 31 December 1996 amounted to a sum of RM348,582.43. By letter dated 26 November 1996, the defendant was said to have wrongfully and unlawfully terminated the management agreement.

The parties were certainly at loggerheads. To make matters worse the parties were engaged in a litigation *vide* Kuala Lumpur High Court suit no: D2-22-67-96 where the parties were asserting competing claims over the said hotel.

It was said that the defendant had refused to facilitate payments that were required to be made by the hotel and that included payments for staff salaries and operating expenses pending the determination of the contractual dispute between the parties relating to the exercise of an option clause to extend the management agreement for a further ten (10) years.

***Ex parte* Applications**

There were two *ex parte* applications. One by the plaintiff in encl. 4 and the other by the defendant in encl. 10. I shall now elaborate.

On 6 December 2001, the plaintiff filed an *ex parte* summons in chambers and sought for the following prayers as seen in encl. 4:

1. The Defendant whether by its agents, servants, officers or howsoever, be restrained from interfering with or obstructing or hampering the Plaintiffs continued management and operation of The Regency Hotel and Resort, Port Dickson ('the Hotel");

2. The Defendant within 2 days of service of this order, whether by its agents, servants, officers or howsoever, including by way of signing cheques or issuing instructions, do all things as may be necessary to pay, authorise, or ensure payment of wages, allowances or contractual dues owing to or arising in respect of all persons working at the Hotel for the period November 2001 as specified in SCHEDULE A herein out of the

funds generated by the operations of the Hotel including funds in Bumiputra Commerce Bank Account No. 05080007490051 and The Standard Chartered Bank Account No. 836144611102 ("the accounts"), and for subsequent months to pay, authorise or ensure payment from the funds as aforesaid in accordance with such lists of staff or employees as may be submitted by the Plaintiff to the Defendant within 7 days of receipt of such submission;

3. The Defendant within 2 days of service of this order, whether by agents, servants, officers or howsoever, do all things as may be necessary to pay, authorise or ensure payment of outstanding amounts due to suppliers and creditors as specified in SCHEDULE B herein, out of the funds generated by the operations of the Hotel including funds in the accounts and to hereafter pay, authorise or ensure payment from the funds as aforesaid in accordance with such lists of creditors and suppliers as may be periodically submitted to the Defendant by the Plaintiff within 7 days of receipt of such submission;

4. The parties be at liberty to apply;

5. A date to be fixed for the *inter partes* hearing of this application;

6. That provision may be made for the costs of this application; and

7. Such further or other relief which this Honourable Court deems fit.

And this court heard encl. 4 on 6 December 2001 and granted prayers (1), (2), (3) and (4) with costs to be costs in the cause. This court also directed the plaintiff to give an undertaking as to damages. The *inter partes* hearing was fixed on 24 December 2001 – during the court vacation. The *ex parte* order has since been extracted as seen in encl. 7.

Order 29 r. 1(2) of the Rules of the High Court 1980 ("RHC") states that an *ex parte* application must be made by summons and where the case is one of urgency. Indeed the question of urgency plays a pivotal role to determine an *ex parte* application (*Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319). In a situation where the property is in danger of being lost or destroyed, an *ex parte* application would be entertained (*Brand v. Mitson* [1876] 24 WR 524). Enclosure 4 was supported by an affidavit affirmed by Matsham bin Ahmad ("Matsham") on 5 December 2001 which was filed on the same date as seen in encl. 3. There was a certificate of urgency in encl. 5 and according to the case of *Png Siaw Luan v. Wong Tui San* [1990] 3 MLJ 340 an interim injunction obtained *ex parte* where there is no urgency can be set aside on that ground alone. I venture to say that *ex parte* applications are also suitable in cases where secrecy is essential (*Castle Fitness Consultancy Pte Ltd v. Manz* [1990] 1 MLJ 141 at p. 143F).

An *ex parte* application must be made promptly and there must not be any delay. In *Ban Seng Hong Sdn Bhd v. Malaysian French Bank Bhd* [1989] BLD Yearbook 353 a delay of six months was held to be fatal to an application for an *ex parte* injunction restraining receivers and managers appointed under a debenture from acting. Any delay would, of course, tip the balance of convenience in favour of the defendant (*Yomeishu Seizo Co Ltd v. Sinma Medical Products (S) Pte Ltd* [1991] 3 CLJ 2357; [1991] 4 CLJ (Rep) 1189).

It is germane to remember that all the facts must be laid before the court and nothing must be suppressed (*R v. Kensington Income Tax Commissioners* [1917] 1 KB 504 (CA)). If there was suppression, the order may be set aside without the need for the court to go into the merits of the matter (*Boyce v. Gill* [1891] 64 LT 824).

So much for the brief discourse on the law.

Now, by way of an *ex parte* summons in chambers in encl. 10, the defendant sought for the following prayers:

1. That this Honourable Court grants leave to file this application out of time;

2. That the enforcement of the Court Order dated 6.12.2001 for a mandatory injunction be stayed pending the hearing of the Plaintiff's *inter partes* application;

3. That the hearing date of the Plaintiff's *inter partes* application fixed on 24.12.2001 be brought forward or alternatively a new date be fixed early next year for hearing of the same;

4. The costs of this application be costs in the cause;

5. Such further and other relief deem just and reasonable by this Honourable Court.

Enclosure 10 was supported by an affidavit affirmed by Shikha Dutt a/p Delip Kumar Dutt ("Shikha Dutt") on 10 December 2001 and there was also a certificate of urgency in encl. 11. I heard encl. 10 on 11 December 2001 and I dismissed it with no order as to costs since the plaintiff was not informed of the application (*Lim Hean Pin v. Thean Seng Co Sdn Bhd v. Ors* [1991] 2 MLJ 564). I maintained the hearing of the *inter partes* on 24 December 2001.

***Inter partes* Hearing On 24 December 2001**

On 24 December 2001, the hearing for the *inter partes* was adjourned to 26 December 2001 – a day after Christmas.

In response to encl. 3, the defendant affirmed an affidavit through Shikha Dutt on 21 December 2001 which was filed on the same date as seen in encl. 13. In rebuttal, the plaintiff responded by filing an affidavit affirmed by Matsham on 24 December 2001 which was filed on the same date as seen in encl. 14. It must be noted that encl. 14 was filed on 24 December 2001 at 8.40am – on the very day when the *inter partes* hearing was supposed to proceed. According to Mr. Zainal Abidin bin Jamal ("Mr. Zainal Abidin"), the learned counsel for the defendant, encl. 14 was received by him at 8.45am on 24 December 2001 and he said that a quick perusal of encl. 14 showed that it substantially responded to the factual matters that were raised by the defendant's affidavit in encl. 13 thus necessitating a reply. Mr. Zainal Abidin submitted that the factual matters that were set out by the plaintiff's affidavit in encl. 14 contained facts which were not found in the plaintiff's affidavit in encl. 3. It must be recalled that encl. 3 was an affidavit in support of the plaintiff's *ex parte* application in encl. 4. Mr. Zainal Abidin reiterated that the defendant wished to respond to encl. 14 by filing an affidavit in reply.

Mr. R. Abraham, the learned counsel for the plaintiff, submitted that in the meantime this court ought to refix the *inter partes* hearing on an urgent basis and he too craved this court's indulgence to extend the *ex parte* order that was granted on 6 December 2001 until the *inter partes* hearing was disposed off. Mr. Zainal Abidin replied and he said that he had no instructions to agree to the *ex parte* order to be extended until the disposal of the *inter partes* hearing. Mr. Zainal Abidin pointed out that in the absence of consent on the part of the defendant to extend the *ex parte* order, that order will be expiring on 26 December 2001. Mr. Zainal Abidin also pointed out that this court had no power to extend the *ex parte* order in view of the crucial time element.

It cannot be denied that the Hari Raya Puasa that fell on 16 December 2001 – a Sunday, which was followed by two public holidays on 17 December 2001 and 18 December 2001 must have put a heavy strain on the parties.

Both parties then agreed that the *inter partes* hearing be fixed on 26 December 2001 – also a court vacation day, and I was not the vacation judge.

The *Inter partes* Hearing On 26 December 2001

Through Mohd Qari bin Ahmad ("Mohd Qari") the defendant filed an affidavit in reply in encl. 15. Mohd Qari affirmed encl. 15 on 26 December 2001 and it was filed on the same date at 8.45am. Mr. R. Abraham informed the court that he was served with encl. 15 on the morning of 26 December 2001 and he was constrained to seek a short adjournment to take instructions on the further affidavit and to put the further response of the plaintiff's affidavit. Mr. R. Abraham requested that the *inter partes* hearing of encl. 4 be adjourned to a date where all the affidavits will be before this court and taking into account

the urgency of the matter, he requested that the hearing of the *inter partes* be fixed in the first week of January 2002. Mr. R. Abraham also submitted that in the interim period this court has the jurisdiction to extend the *ex parte* order that was granted on 6 December 2001 as reflected in encl. 7.

According to Mr. R. Abraham the *ex parte* order will lapse on 27 December 2001 and not 26 December 2001 and he relied on s. 105(a) of the Interpretation Acts 1948 and 1967 which enacts as follows:

> In computing time for the purposes of any written law, unless the contrary intention appears –
>
> (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done;

and he submitted that since the *ex parte* order was granted on 6 December 2001, that day to be excluded and so the last day for the *inter partes* hearing would be on 27 December 2001and not 26 December 2001.

But Mr. Zainal Abidin held an opposite view. He cited the case of *Bank Utama (M) Bhd v. Seri Mayhua Sdn Bhd & Ors* [2001] 5 MLJ 169 where the court held that if the life span of the order was seven (7) days and below, then the date wherein the order was given was to be excluded. So he submitted that conversely in our case since the life span of the *ex parte* order was twenty one (21) days, then the date wherein the *ex parte* order was granted, namely 6 December 2001, was to be included and this meant that the *ex parte* order would expire on 26 December 2001. The case of *Aje Best-On Sdn Bhd v. YB Ahmad Omar & Anor* [2000] 3 CLJ 515 was also cited and that case decided that in calculating time, the date of the order would be taken into account notwithstanding that it involved seven (7) days or less and thus it was submitted that the date when the *ex parte* order was granted, namely, 6 December 2001 would be taken into account.

It was submitted by Mr. Zainal Abidin with vigour and vitality that the date of the *ex parte* order ought to be included for calculation purposes. Thus, twenty-one days will begin from 6 December 2001 and will expire on 26 December 2001.

With respect, to compute the time wherein the *ex parte* order that was granted on 6 December 2001 would end would be by referring to the relevant provisions of the RHC. In the context of the present case, I need to refer to O. 29 r. 1(2B) of the RHC which stipulates that:

> Unless sooner revoked or set aside, an interim injunction obtained on an *ex parte* application shall automatically lapse at the end of 21 days from the date on which it is granted.

It must be noted that the time span of "21 days" was incorporated by way of an amendment *vide* P.U. (A) 342, Jil.44, No: 19 on 21 September 2000 and it came into force on 22 September 2000. That amendment did away with the "two weeks" life span. Be that as it may, by virtue of O. 29 r. 1(2B) of the RHC as presently worded, the words "from the date on which it is granted" must surely mean that 6 December 2001 must be taken into account in calculating 21 days. This should be the way to compute time in relation to the life span of an *ex parte* order for an interim injunction and the last day for the *ex parte* order to "automatically lapse" shall be on 26 December 2001. This was my judgment and I so hold accordingly.

Mr. R. Abraham did not lose hope. He continued to submit that because of the exchange of affidavits the plaintiff was constrained to request that the hearing of the *inter partes* scheduled for today – meaning on 26 December 2001, be adjourned to next year preferably to the early part of January 2002. He too submitted that pending the hearing of the *inter partes* in January 2002, the plaintiff wished to address this court on the question of whether the *ex parte* order that was granted on 6 December 2001 could be extended notwithstanding the objection of the defendant.

Mr. Zainal Abidin replied and he submitted that the *inter partes* hearing was fixed based on O. 29 r. 1(2BA) of the RHC. He submitted that no useful purpose would be achieved to extend the life span of the *ex parte* order because the full facts of the case have not crystallised since the plaintiff has indicated its desire to reply to the affidavit in encl. 15. He submitted that it was not possible for this court to evaluate the facts today – meaning on 26 December 2001, and therefore this court could not appraise the situation and make a ruling as to whether to order a mandatory injunction in favour of the plaintiff pending the hearing of the suit.

In response, Mr. R. Abraham drew my attention to the case of *Jakob Renner (an infant suing through his father and next friend, Gilbert Renner) & Ors v. Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur & Ors* [2000] 3 CLJ 569. That was a case where the High Court had all the affidavits filed therein at its disposal and the court then granted an ad interim injunction pending the disposal of the application for an interlocutory injunction. I was asked to follow *Jakob Renner*. I refused because here unlike there all the affidavits were not before me because the plaintiff expressed its desire to respond to the affidavit in encl. 15.

Mr. Zainal Abidin pointed out that an injunction has its origin in equity and that equity would look at the substance rather than the form. In substance, he said that the plaintiff was seeking an extension of the *ex parte* mandatory injunction and by so doing the plaintiff was attempting to circumvent O. 29

r. 1(2BA) of the RHC. He submitted that *Jakob Renner*'s case was decided on 4 November 1999 whereas r. 1(2BA) of O. 29 of the RHC was inserted by way of an amendment that came into effect on 22 September 2000. He echoed my observations that all the affidavits in *Jakob Renner*'s case were before the court there unlike our present case.

At this juncture, I drew the attention of the parties to the Court of Appeal decision in the case of *Cheah Cheng Lan v. Heng Yea Lee* [2001] 1 CLJ 727. There the Court of Appeal (Lamin PCA, Mokhtar Sidin and Abdul Kadir Suleiman JJCA) disagreed with the decision of *Umas Sendirian Bhd v. RHB Bank Bhd & Anor* [2000] 6 CLJ 564 (a decision of Tee Ah Sing J) which generously cited and applied the case of *Lim Nyook Yin v. Ultratech Sdn Bhd & Anor* [1995] 1 CLJ 215 (a decision of Abdul Malik Ishak J). The judgment of the Court of Appeal in *Cheah Cheng Lan v. Heng Yea Lee (supra)* was written by Lamin PCA just before he retired and he had to consider the issue of whether the court has an inherent power to extend an *ex parte* injunction order from time to time until the disposal of the main suit. He was of the view that by virtue of O. 29 r. 1(2BA) of the RHC, the life span of an *ex parte* injunction cannot go beyond the period of 21 days. He too held that the court had no power to extend the life of an *ex parte* injunction beyond 21 days because of the employment of the words "shall automatically lapse". He was of the view that r. 1(2BA) of O. 29 of the RHC laid emphasis on urgency and speedy disposal of the matter. He concluded that, as presently worded, r. 1(2B) and r. 1(2BA) of O. 29 of the RHC did not admit the use of the inherent powers of the court as provided under O. 92 r. 4 of the RHC.

Three observations must be made here:

(1) The case of *Lim Nyook Yin v. Ultratech Sdn Bhd & Anor (supra)* was decided on 12 October 1994 while the case of *Umas Sendirian Bhd v. RHB Bank Bhd & Anor (supra)* was decided on 15 May 2000.

(2) When these two cases were decided – referring to *Lim Nyook Yin* and *Umas Sendirian Bhd*, O. 29 r. 1(2B) of the RHC contained the words "two weeks" and not "21 days."

(3) When these two cases were decided – referring to *Lim Nyook Yin* and *Umas Sendirian Bhd*, sub-r. (2BA) to O. 29 r. 1 of the RHC had not been inserted in the RHC.

As I perceived it, *Cheah Cheng Lan*'s case *(supra)* laid down two principles of law:

(a) that where the life span of an *ex parte* injunction has been determined by the rules, the court must give effect to it; and

(b) that the inherent powers of the court cannot be used to extend the *ex parte* injunction order from time to time.

Order 92 r. 4 of the RHC states as follows:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

and it has been vigorously applied by other learned judges in other cases. For a start, I shall refer to the case of *Arab-Malaysian Credit Bhd v. Tan Seang Meng* [1995] 1 CLJ 773, a decision of the Court of Appeal (Gopal Sri Ram, VC George and Abu Mansor JJCA), which was decided on 27 February 1995, where Gopal Sri Ram JCA speaking for the Court of Appeal said at p. 782 of the report:

> Quite apart from O. 6 r. 7, there is a wide power under O. 3 r. 5 conferred upon the High Court to extend time. Even the restriction of granting more than one extension of 12 months expressed in O. 6 r. 7 may, in appropriate cases, be overcome by having resort to O. 92 r. 4 (absent in the English RSC) which is a jurisdictional provision. (See *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319).
>
> Further, in a recent and yet unreported judgment of this court, reference has been made to the important principle that a rule of court should not be construed so as to produce unfairness or a manifest injustice. (See *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd*, Court of Appeal Civil Appeal No P-02-7-94 (since reported in [1995] 1 CLJ 491)). Surely, this principle may be invoked to overcome any technical obstacles in the way of achieving substantial justice in a case where a pedantic approach to a rule of court will result in injustice.

And it was to achieve "substantial justice" that the Court of Appeal in *Arab-Malaysian Credit Bhd v. Tan Seang Meng (supra)* had resorted to apply O. 92 r. 4 of the RHC generously. It must be stressed that *Cheah Cheng Lan*'s case did not consider the decision of *Arab-Malaysian Credit Bhd v. Tan Seang Meng (supra)* emanating from a different coram of the Court of Appeal. I cannot help but feel constrained to say that O. 92 r. 4 of the RHC can be invoked to override the provisions of the rules and that the Court of Appeal in *Cheah Cheng Lan* was *per incuriam* in not considering its earlier decision in *Arab-Malaysian Credit Bhd v. Tan Seang Meng (supra)*. The Court of Appeal in *Cheah Cheng Lan* took the view that the inherent powers of the court were not admissible when the rules have determined the matter. But O. 92 r. 4 of the RHC places justice above all else and justice has been placed on a high pedestal; it gives the powers to the court to make "any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court."

Next, I will refer to the case of *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, a decision of the Federal Court (Eusoff Chin CJ, Edgar Joseph Jr and Wan Yahya FCJJ), where Edgar Joseph Jr FCJ responding to the dissenting judgment of Wan Yahya FCJ had referred to the observations of Sir Jack Jacob QC, the former Senior of the Supreme Court in the United Kingdom in his article entitled "*The Inherent Jurisdiction Of The Court*" [1970] Current Legal Problems 23 and at p. 229 of the report his Lordship Edgar Joseph Jr FCJ said:

> The learned author then directs attention to the point that the powers conferred by the rules of court are generally **additional to and not in substitution** of the powers arising out of the inherent jurisdiction of the court, in these terms (at p. 25):
>
> > The inherent jurisdiction of the court may be exercised in any given case, **notwithstanding that there are rules of court governing the circumstances of such case.** The powers conferred by rules of court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction. (emphasis added).

Continuing at p. 230 of the report, his Lordship Edgar Joseph Jr. FCJ said:

> Defining inherent jurisdiction, the learned author said this (at p 51):
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> > … the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.
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> Explaining the relation between the inherent jurisdiction and rules of court, the learned author says this (at p 50):
>
> > The powers of the court under its inherent jurisdiction are complementary to its powers under rules of court; one set of powers supplements and reinforces the other. The inherent jurisdiction of the court is a most valuable adjunct to the powers conferred on the court by the rules.
>
> And, in the next paragraph explaining the usefulness of the inherent jurisdiction, he adds (at pp 50 and 51):

> On the other hand, where the usefulness of the powers under the Rules ends, the usefulness of the powers under inherent jurisdiction begins. This is shown in three important respects in which the powers arising out of the inherent jurisdiction differ from those conferred by rules of court. First, perhaps by their very nature, they are wide and more extensive powers, permeating all proceedings at all stages and filling any gaps left by the Rules and they can be exercised on a wider basis, for example, by enabling the court to admit evidence by affidavit or otherwise in order to examine all the circumstances appertaining to the merits of the case. Secondly, they can be invoked in respect of persons who are not themselves actual litigants in pending proceedings. Thirdly, they can be used to punish the offender by fine or imprisonment.

In the Singapore case of *Heng Joo See v. Ho Pol Ling* (Divorce Petition No 94 of 1993), Coomarasamy J put O. 92 r. 4 (RSC) and O. 79 r. 4 (SCR), (identically worded to our O. 92 r. 4 of the Rules of the High Court 1980) in its correct perspective when he said:

> … (it does) not define or give the jurisdiction …. It merely states that the Rules of Supreme Court shall not limit or affect the inherent powers which are common law powers.

Finally, his Lordship Edgar Joseph Jr. FCJ observed at p. 230 to p. 231 of the report:

> In my view, O. 92 r. 4 is a unique rule of court for while it neither defines nor gives jurisdiction, yet it serves as a reminder and confirmation – lest we forget – of the common law powers of the court, which are residuary or reserve powers and a separate and distinct source of jurisdiction from the statutory powers of the court.
>
> In other words, even without O. 92 r. 4, the inherent powers of High Court would still be there. In the United Kingdom, for instance, there is no provision in the Supreme Court Rules, equivalent to our O. 92 r. 4, yet the inherent powers occupy a position of great importance in the High Court there as the article by Sir Jack Jacob amply demonstrates. And, the Court of Appeal there also exercises an inherent jurisdiction (see *Aviagents v. Balstravest Investment Ltd* [1966] 1 WLR 150) notwithstanding the absence of any provision in any written law or rule of court providing for inherent powers.
>
> Similarly, I have no doubt that in this country, the Court of Appeal and the Federal Court also exercise inherent jurisdiction. And lest we forget, at the risk of repetition, supervisory jurisdiction is the creature of the common law and is available in the exercise of the court's inherent power though its extent may be determined not merely by judicial development but also by legislative intervention, as for example, para 1 of the Schedule read together with s. 25 of the Courts of Judicature Act 1964.

Next, it would be the case of *Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 CLJ 31; ([1988] 1 CLJ (Rep) 244), a decision of the then Supreme Court (Lee Hun Hoe CJ (Borneo), Seah and Syed Agil Barakbah SCJJ) where Syed Agil Barakbah SCJ delivering the judgment of the then Supreme Court said at p. 34 (at p. 247) of the report:

> Has the court any jurisdiction to exercise its inherent powers in the instant case? Order 92 rule 4 RHC provides:
>
> 4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.
>
> We read this to mean that the rules cannot interfere with the exercise of the inherent powers by the court so long as it deems it necessary to prevent any injustice or any abuse of its own process. It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.

Having bandied around sub-r. (2BA) of O. 29 r. 1 of the RHC, I must now reproduce that sub-rule:

> The *ex parte* interim injunction must be served on the relevant party within one week of the date of the order granting the interim injunction, and the court when granting the injunction must forthwith fix a date for *inter partes* hearing to be held before the expiry of the 21 days.

It would certainly be ideal to apply O. 92 r. 4 of the RHC when construing sub-rr. (2B) and (2BA) of O. 29 r. 1 of the RHC after all justice is the name of the game. It would be pointless if the court remains idle and not invoke its "residuary or reserve powers" under O. 92 r. 4 of the RHC. The scenario for an *ex parte* interim injunction would be as follows: at the end of the 21 days when the *inter partes* hearing comes up before the judge, the affidavits would not have closed and invariably more affidavits need to be filed. Sub-rr. (2B) and (2BA) of O. 29 r. 1 of the RHC make no express provisions after the lapse of the *ex parte* interim injunction order and pending the disposal of the *inter partes* hearing. Litigants, like the plaintiff here, would be severely prejudiced if the courts are unwilling to invoke its inherent powers under O. 92 r. 4 of the RHC. Here notwithstanding the fact that the defendant objected to the extension of the *ex parte* interim injunction order and bearing in mind that the plaintiff wanted to respond to the affidavit of Mohd Qari in encl. 15, this court could certainly resort to O. 92 r. 4 of the RHC and extend the life span of the *ex parte* order. The rules committee saw it fit to incorporate O. 92 r. 4 into the RHC and that Order must be applied vigorously to the factual matrix of the present case. Surely the rules committee did not

intend to treat O. 92 r. 4 as a mere ornament in the RHC devoid of any meaning (*Lim Eng Kay v. Jaafar bin Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190, a decision of the then Federal Court by Salleh Abas FJ, which was cited and applied in *Fulcrum Capital Sdn Bhd v. Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) & Another case* [2001] 5 CLJ 73.

Even Steve LK Shim J (as he then was and now the Chief Judge of Sabah & Sarawak) was of the view in *IHFIM Consultancy Services (M) Sdn Bhd v. Baharin Ayob & Ors (No 1)* [1998] 3 CLJ Supp 230 that while waiting for the hearing of the summons in chambers application to extend the injunctive reliefs granted *ex parte*, the court was empowered to extend the *ex parte* injunctive order until the conclusion of the hearing of the summons in chambers application. This was what his Lordship said at p. 231 to p. 233 of the report in regard to the unamended sub-r. (2B) of O. 29 r. 1 of the RHC:

> Let me state quite firmly that I do not accept the proposition that this court has no power or jurisdiction to entertain a request of an application to extend an interim injunction granted under an *ex parte* application and to allow the extension where the interest of justice so requires. Order 29 r. 1(2B) Rules of the High Court merely states that an interim injunction obtained on an *ex parte* application shall lapse at the end of two weeks from the date it is granted unless sooner revoked or set aside. It does not, in any way, prohibit an applicant from applying *inter partes* to extend an interim injunction obtained under an *ex parte* application. This is clearly reflected in the many cases (where) *inter partes* applications had been made to extend such injunctions until the trial of the action.
>
> In this case, the plaintiff has, as I have said, filed a summons-in-chambers application for extension of the injunctive reliefs granted in an *ex parte* application. This is of course an inter partes application and the defendants and/or their solicitors have been duly served or notified. Indeed, counsel for the defendants is present in court. It should perhaps be noted that such an application is invariably made just before the *ex parte* order lapsed, as in this case. Here, the problem has arisen as to the power of the court in considering the request of Miss Yeoh for extension of the injunctive reliefs granted under the *ex parte* order dated 5 March 1998 until the conclusion of this summons-in-chambers application. This request is apparently prompted by the fact that an adjourned hearing of the said summons-in-chambers application would, because of the need to allow time for the defendants to file the relevant affidavits in reply, be heard after the lapse of the *ex parte* order dated 5 March 1998 thereby giving rise to a situation where the claims of the plaintiff are likely to be prejudiced because, according to Miss Yeoh, the defendants are presently and actively engaged in negotiations with some 3rd party. As I have said, Encik Mohd Roshali for the defendants has submitted that the court has no power whatsoever to consider such a request because of the express

provisions in O. 29 r. 1(2B) Rules of the High Court. With respect, I must disagree. In my view, the court has the inherent jurisdiction to entertain such request if the interest of justice demands it. This is reflected in O. 92 r. 4 Rules of the High Court which stipulates:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

In the instant case, the request by Miss Yeoh is in fact in the nature of *inter partes*. Both counsel for the disputing parties are present and they have each made the relevant submissions before me. Having considered everything and in particular the fact that, as conceded by counsel for the defendants, another party has apparently made a claim for the same copyright, I am satisfied that the plaintiff's claims may well be prejudiced if the request is not granted. In the exercise of my inherent jurisdiction, justice will be better served if I allow the request and order that the injunctive reliefs granted in *ex parte* order dated 5 March 1998 be extended until the conclusion of the summons-in-chambers application. Order accordingly.

Of course in the present case there was no formal application to extend the life span of the *ex parte* interim injunction order in encl. 7 until the disposal of the hearing of the *inter partes*, but the general principles of law enunciated by the learned judge in *IHFIM Consultancy Services (M) Sdn Bhd v. Baharin Ayob & Ors (No 1) (supra)* are of general application and would certainly apply to the present case.

In whittling away the inherent powers of the court to resort to O. 92 r. 4 of the RHC, the Court of Appeal in *Cheah Cheng Lan* must have delivered a decision which was *per incuriam* in that it failed to take into account the Court of Appeal decision of *Arab-Malaysian Credit Bhd v. Tan Seang Meng (supra)*, the Federal Court decision of *R Rama Chandran v. The Industrial Court of Malaysia & Anor (supra)*, and the Supreme Court decision of *Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors (supra)*. Lord Goddard CJ in the Court of Appeal in *Huddersfield Police Authority v. Watson* [1947] 2 All ER 193 gave a judicial meaning to the phrase *"per incuriam"* at p. 196 of the report:

> What is meant by giving a decision *per incuriam* is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute.

In *Morelle Ltd v. Wakeling* [1955] 1 All ER 708, the Court of Appeal speaking through Sir Raymond Evershed MR described the meaning of the phrase *"per incuriam"* in this way (see p. 718 of the report):

> As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be, in the language of Lord Greene, MR, of the rarest occurrence.

Sir John Donaldson MR in his speech in the Court of Appeal in *Duke v. Reliance Systems Ltd* [1987] 2 WLR 1225 at 1228 said of the *"per incuriam"* phrase in these words:

> I have always understood that the doctrine of *per incuriam* only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision. That is *per incuriam*. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it might have reached a different conclusion. That appears to me to be the position at which we have arrived today.

I was urged not to follow *Cheah Cheng Lan*. The plaintiff's counsel submitted that the decision in *Cheah Cheng Lan* was an unworkable decision limited to its particular facts and, consequently, it was strenuously argued that this court should extend the *ex parte* interim injunction order till the *inter partes* hearing was finally disposed off in January 2002.

Mr. Zainal Abidin responded and this was the gist of his response:

(1) That those cases – referring to *Arab-Malaysian Credit Bhd v. Tan Seang Meng (supra), R Rama Chandran v. The Industrial Court of Malaysia & Anor (supra),* and *Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors (supra),* were not concerned with sub-rr. (2B) and (2BA) of O. 29 r. 1 of the RHC. Those cases too did not have to construe provisions having the "shall automatically lapse" period of time.

(2) The essence of *Cheah Cheng Lan* was that the inherent powers of the court which would generally be available will not become available in the face of specific provisions.

(3) If there is a lacuna in the law arising from the decision of *Cheah Cheng Lan,* that lacuna can safely be addressed by the rules committee.

(4) What the plaintiff sought to do was to extend the life span of the *ex parte* interim injunction order beyond the 21 days which was simply barred by *Cheah Cheng Lan* without the need to seek recourse to O. 92 r. 4 of the RHC.

Is *Cheah Cheng Lan* a workable decision? Has *Cheah Cheng Lan* broken the spirit of the commercial world by making life miserable to the plaintiff litigant? Can the court on the strength of *Cheah Cheng Lan* throw O. 92 r. 4 of the RHC to the wind? Is *Cheah Cheng Lan*, a decision made *per incuriam* in regard to the applicability of O. 92 r. 4 of the RHC? These are the nagging questions which may be posed.

Take the scenario of the present case:

(1) On 6 December 2001, the plaintiff obtained an *ex parte* interim injunctive order against the defendant as reflected in the sealed order as seen in encl. 7.

(2) This court gave the date for the *inter partes* hearing before the expiry of the 21 days and that would be on 24 December 2001.

(3) On 24 December 2001, the plaintiff's counsel sought an adjournment of the *inter partes* hearing for the purpose of filing an affidavit in reply to encl. 14 (the affidavit that was filed by the defendant). This court then adjourned the *inter partes* hearing to 26 December 2001 – which was the last day of the 21 days life span.

(4) On 26 December 2001, being the final date for the hearing of the *inter partes*, the defendant through Mohd Qari filed an affidavit in reply in encl. 15 at 8.45am. The plaintiff was interested in replying to encl. 15 but *Cheah Cheng Lan* posed a barrier. So the plaintiff sought orally to extend the *ex parte* interim injunctive order notwithstanding Cheah Cheng Lan and notwithstanding the vehement objections advanced by the defendant.

(5) It must be borne in mind that the 21 days rule that should be complied with calculated from 6 December 2001 saw a Hari Raya Puasa on 16 December 2001 – a Sunday, and it was followed by two public holidays. Both parties were certainly deprived of enjoying the holidays since they were busy with the assistance of their counsel to prepare the relevant affidavits. To apply *Cheah Cheng Lan* would mean that this court could not prevent injustice by applying O. 92 r. 4 of the RHC. Is this the law of the country? The plaintiff merely seeks to extend the life span of the *ex parte* interim injunctive order to January 2002 where the hearing of the *inter partes* would be disposed off based on all the affidavits that have been filed by then.

To me the inherent jurisdiction of the court may be invoked in a wide variety of circumstances which can never be listed nor particularised. It is indeed viable. According to *Peacock v. Bell & Kendall* [1667] 1 Wms. Saund. 73; *Berad v. Berad* [1919] AC 956 PC; and *Re Nichia Estate and City of Toronto* [1968] 66 DLR (2d) 200; the High Court as a superior court of record has a general jurisdiction which is unrestricted and unlimited covering all matters of substantive law – civil as well as criminal, unless that general power has been taken away in unequivocal terms by statutory enactment. The High Court is certainly free to decide in all matters concerning the general administration of justice within its scope of general jurisdiction and it is certainly subject to supervisory control by way of an appeal (*Bursey v. Bursey* [1960] 58 DLR (2d) 451; and *Camosun Commercial Co. v. Gareston & Bolster* [1914] 7 WWR 219). But nevertheless its general jurisdiction remains intact and unimpeded and that jurisdiction includes the exercise of its inherent jurisdiction. While the statute gives statutory jurisdiction to the court, the inherent jurisdiction of the court remains viable and it eludes definition. Of significance it must be borne in mind that the inherent jurisdiction of the court is a residual power – very potent, and it is exercisable in the course of dispensing justice. It is, as I said, procedural in nature covering both civil and criminal (*Connelly v. D.P.P.* [1964] AC 1254; and *R v. Jefferies* [1968] 3 WLR 830, [1968] 3 All ER 238) and it is always invoked when a litigation is in process. The inherent jurisdiction is always exercisable in a summary way. Of pertinence to note is this: that the inherent powers of the court as conferred by O. 92 r. 4 of the RHC are in addition to and not in substitution of the powers of the court arising out of its inherent jurisdiction. These two powers are not mutually exclusive; rather the court may resort to one or to both of these powers in any given case. These two powers are the "life-blood" of the courts and without them the courts are powerless and would be relegated to being mere "toothless tigers." In the words of Lord Morris in *Connelly v. D.P.P. (supra)* at p. 1301 of the report:

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

These powers would certainly give authority to the judiciary to carry out its onerous duties in administering justice according to law in a regular, orderly and effective way. Thus, acting under its inherent jurisdiction, the court may decline to proceed when the party is dead or is non-existent (*Tetlow v. Orela Ltd* [1920] 2 Ch. 24; and *Lazard Brothers & Co. v. Midland Bank Ltd* [1933] AC 296) or where the proceedings are entirely hypothetical or related to an

issue which is no longer subsisting or related to a future event or are purely fictitious (*Glasgow Navigation Co. v. Iron Ore Co.* [1910] AC 293; *Sun Life Assurance of Canada v. Lewis* [1944] AC 111; *Re Barnato* [1949] Ch. 258; and *Sumner v. William Henderson & Sons Ltd* [1963] 1 WLR 823, [1963] 2 All ER 712).

But here I am faced with the decision of the Court of Appeal in *Cheah Cheng Lan* and it immediately brings to mind the doctrine of precedent. It is a doctrine of the superior court decisions and their *ratio decidendi*, having binding force on the hierarchy of courts. Must I apply *Cheah Cheng Lan* notwithstanding my own predilection? When the judge is bound by precedent, there is in reality no leeway for *stare decisis* to operate. The judge, like me, has no choice and is simply bound to apply the precedent no matter how bad the precedent is, no matter how erroneous the precedent is. As times change and our mores and community experiences alter, decisions that were made in the times and circumstances in which they were decided may turn out to be no longer appropriate. I had occasion to say something about the doctrine of *"stare decisis"* in the case of *All Persons in Occupation Of The House and the Wooden Stores Erected on a Portion of Land Held Under Grant No. 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn Bhd* [1998] 5 CLJ 49 and this was what I said at p. 1863 of the AMR reporting and at p. 55 to p. 56 of the CLJ reporting:

> I will now address my mind to the principle of *'stare decisis'* or what is commonly known as the principle by which a court is bound to follow decisions in former cases. The use of precedent is an indispensable tool in a court of law. It is an indispensable foundation upon which the judge is to decide what is the law and what is its application to individual cases. The only thing that I can see in a judge's decision binding as an authority is the principle upon which the case was decided (see *Osborne v. Rowlett* [1880] 13 Ch D 774 at p. 785). In my considered view, judicial authority belongs not to the exact words used nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision (see *Close v. Steel Co of Wales Ltd* [1962] AC 367; [1962] 2 All ER 953 (HL)). Thus, the enunciation of the reason or principle upon which a question before the court has been decided is said to be binding as a precedent. What constitutes binding precedent is the *ratio decidendi* and this is ascertainable by an analysis of the material facts of the case. It is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the *ratio decidendi* of the case (see *Monk v. Warbey* [1935] 1 KB 75 at p. 78 (HL)). It is germane to mention that mere passing remarks of a judge are known as *'obiter dicta'*, whilst considered enunciations of the judge's opinion on a point not arising for decision, and so not part of the *ratio decidendi*, have been termed as *'judicial dicta'* (see *Richard West & Partners (Inverness) Ltd v. Dick* [1969] 2 Ch 424 at p. 413; [1969] 1 All ER 289 at p. 292). With respect, the

decision in *See Teow Guan* in respect of the approach to be adopted when confronted with an application for a stay at best can be described as *'obiter dicta'*. *See Teow Guan* jettisoned the special circumstances approach in favour of the nugatory approach without considering the decisions of the Federal Court in *Jasanusa* and *Dato' Hj Ghani Gilong*. On the principle of *stare decisis*, I am bound by the two decisions of the Federal Court and, consequently, the special circumstances approach was adopted by me.

Having heard the arguments of both parties, I then recorded the following annotations in the judge's note book:

The hearing of the *inter partes* has not started in view of the fact that the plaintiff desires to file an affidavit in response to the affidavit in enclosure 15.

The order as per encl. 7 dated 6 December 2001 will expire today ie, 26 December 2001. Enclosure 7 relates to an *ex parte* interim injunction granted by this court on 6 December 2001 as per prayers 1, 2, 3 of encl. 4 together with costs in the cause and for the plaintiff to give an undertaking as to damages.

I am bound by the recent decision of the Court of Appeal in *Cheah Cheng Lan v. Heng Yea Lee* [2001] 1 MLJ 433 and that being the case, I hereby rule that the *ex parte* interim injunction that was granted on 6 December 2001 "shall automatically lapse" by today (26 December 2001). I accordingly refuse the oral application by the plaintiff to extend the life span of the *ex parte* interim injunction that was granted on 6 December 2001 to a date in the early part of January 2002 when the *inter partes* hearing would be heard as proposed by the plaintiff. I reiterate and it must be borne in mind that the *inter partes* hearing scheduled for today has not started at all because the plaintiff wishes to respond to encl. 15.

In the circumstances, for all these reasons, and for the reasons which will be added when a written judgment is delivered, I hereby:

(1) set aside the *ex parte* interim injunction that was granted on 6 December 2001;

(2) order that the plaintiff make good its undertaking as to damages to the defendant and here the defendant has to file a formal application to support its application for that prayer;

(3) refuse to extend the *ex parte* interim injunction that has automatically lapsed by today (26 December 2001) which the plaintiff orally requested to be extended until the hearing of the *inter partes*; and

(4) costs to the defendant.

With a heavy heart, I was constrained to follow *Cheah Cheng Lan* even though that decision was decided *per incuriam* and even though that decision greatly eroded the inherent powers of the court "to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court" as set out in O. 92 r. 4 of the RHC. The doctrine of *stare decisis* compelled me to follow *Cheah Cheng Lan* blindly. As I see it even if the defendant were to agree to extend the *ex parte* interim injunction order till January 2002, which was not the case here, it made not a whit of a difference in the context of *Cheah Cheng Lan* because the last day for the life span of the *ex parte* interim injunctive order would still be on 26 December 2002.

Gerald L. Gall in *"The Canadian Legal System"*, 2nd edn (Toronto: Carswell Legal Publications, 1983) at p. 220 explains the doctrine of precedent or of *stare decisis* in these terms:

> The operation of the doctrine of *stare decisis* is best explained by reference to the English translation of the Latin phrase. '*Stare decisis*' literally translates as 'to stand by decided matters'. The phrase '*stare decisis*' is itself an abbreviation of the Latin phrase '*stare decisis et non quieta movere*' which translates as 'to stand by decisions and not to disturb settled matters'.
>
> Basically, under the doctrine of *stare decisis*, the decision of a higher court within the same provincial jurisdiction acts as binding authority on a lower court within that same jurisdiction. The decision of a court of another jurisdiction only acts as persuasive authority. The degree of persuasiveness is dependent upon various factors, including, first, the nature of the other jurisdiction. Second, the degree of persuasiveness is dependent upon the level of court which decided the precedent case in the other jurisdiction. Other factors include the date of the precedent case, on the assumption that the more recent the case, the more reliable it will be as authority for a given proposition, although this is not necessarily so. And on some occasions, the judge's reputation may affect the degree of persuasiveness of the authority.

It seems to me that the doctrine of *stare decisis* can readily be justified when one looks at the desirability of stability and certainty in the law. Justification of that doctrine may even be based on the notions of justice and fairness. Benjamin N. Cardozo in his treatise entitled *"The Nature of the Judicial Process"* (New Haven and London: Yale University Press, 1921) at note 4 and at p. 33 to p. 34 aptly stated that:

> It will not do to decide the same question one way between one set of litigants and the opposite way between another. 'If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided one yesterday when I was a defendant, I shall look for the same judgment today if I am a plaintiff. To decide differently would raise a feeling of resentment

and wrong in my breast; it would be an infringement, material and moral, of my rights' (per W.G. Miller, *The Data of Jurisprudence* at p. 335). Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.

But not all precedents are good ones. Some have been overruled. As John Bouvier aptly said in "*A Law Dictionary,*" revised 6th edn, 1856:

Stare decisis. To abide or adhere to decided cases.

2. It is a general maxim that when a point has been settled by decision, it forms a precedent which is not afterwards to be departed from. The doctrine of *stare decisis* is not always to be relied upon, for the courts find it necessary to overrule cases which have been hastily decided, or contrary to principle. Many hundreds of such overruled cases may be found in the American and English books of reports. Mr. Greenleaf has made a collection of such cases, to which the reader is referred. Vide 1 Kent, Com. 477; Livingst. Syst. of Pen. Law, 104, 5.

Critics of the doctrine of *stare decisis* will always harp on unfairness and injustice. In this connection, the Right Honourable Lord Denning in his excellent book entitled "*The Discipline of the Law*" (London: Butterworths, 1979) at p. 292 aptly said:

If lawyers hold to their precedents too closely, forgetful of the fundamental principles of truth and justice which they should serve, they may find the whole edifice comes tumbling down about them. Just as the scientist takes his instances and from them builds up his general propositions, so the lawyer should take his precedents and from them build up his general principles. Just as the propositions of the scientist fail to be modified when shown not to fit all instances, or even discarded when shown in error, so the principles of the lawyer should be modified when found to be unsuited to the times or discarded when found to work injustice.

Whatever critics say about the doctrine of *stare decisis*, that doctrine continues to play a pivotal role in the administration of justice in our country. Until the Federal Court overrules *Cheah Cheng Lan*, I have no choice but to abide by its ruling.